

**STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT**

DONNA LIVINGS,

Appellee,

Supreme Court No. _____
Court of Appeals No. 339152
Trial Court No. 2016-1819-NI
Trial Court Judge:
Hon. Edward A. Servitto

v

SAGE'S INVESTMENT GROUP, LLC,
a Michigan limited liability company,
T&J LANDSCAPING & SNOW REMOVAL,
INC., a Michigan Corporation and GRAND
DIMITRE'S OF EASTPOINTE FAMILY
DINING, a Michigan Corporation

Appellants.

**ORAL ARGUMENT
REQUESTED**

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**DEFENDANT-APPELLANT, SAGE'S INVESTMENT GROUP, LLC'S
APPLICATION FOR LEAVE TO APPEAL**

*****ORAL ARGUMENT REQUESTED*****

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STATEMENT OF ORDER APPEALED FROM

On February 26, 2019, the Court of Appeals upended decades of settled premises liability common law and case law in a two-to-one opinion and order, boldly and incorrectly suggesting “[i]t simply cannot be the law that a premises owner can render an all-encompassing hazard on the property ‘effectively unavoidable’ by claiming no one should come near the property.” (Exhibit A, opinion and order from the Michigan Court of Appeals dated February 26, 2019) The majority of that Court suggested it “cannot be the law” despite the dissent’s clear and correct articulation of this Court’s binding precedent. Respectfully, the majority’s suggestion of what the law “simply cannot be” is judicial overreach and a misinterpretation of this Court’s 20 year approach to the open and obvious doctrine and its limited exceptions. Indeed, the Court of Appeals’ majority opinion conflicts with at least this Court’s opinions in *Lugo v Ameritech*, 454 Mich 512; 629 NW2d 384 (2001), *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d (2002), and *Hoffner v Lanctoe*, 492 Mich 450; 821 NW2d 88 (2012), not to mention numerous published and unpublished opinions of the Court of Appeals.

The majority opinion and order appealed from quite simply redefines the open and obvious arithmetic by drastically enlarging the narrow exceptions (i.e., “special aspects”) that were discussed by this Court in its seminal decision, *Lugo*. The *Lugo* decision, which accurately identified common law premises liability, has stood the test of time; that is, it stood the test of time until February 26, 2019 wherein a majority opinion improperly found that *Lugo* and its limited exceptions to the open and obvious doctrine “simply cannot be the law.” Defendant-Appellant is appealing that opinion and order, and asking that this Court restore common law premises liability to what it has consistently and historically been, and find that the exceptions to the open and obvious doctrine are limited and inapplicable to the case at bar.

STATEMENT OF APPELLATE JURISDICTION

This Honorable Court has jurisdiction to hear and decide the Defendant-Appellant's appeal pursuant to MCR 7.305(B)(5)(a) and (b). This appeal is from a two-to-one decision of the Court of Appeals that affirms the trial court's denial of the Defendant-Appellant's motion for summary disposition brought pursuant to MCR 2.116(C)(10). The Court of Appeals' majority opinion conflicts with multiple Michigan Supreme Court decisions, is clearly erroneous and will cause material injustice.

STATEMENT OF QUESTION PRESENTED FOR REVIEW

- I. WHERE A SNOW AND ICE CONDITION IN A COMMERCIAL PARKING LOT WAS OPEN, OBVIOUS AND KNOWN TO EXIST BY THE PLAINTIFF PRIOR TO EXITING HER CAR, WAS THE CONDITION EFFECTIVELY UNAVOIDABLE?**

The trial court ruled:	No
The Court of Appeals ruled:	No
Defendant-Appellant responds:	Yes
Plaintiff-Appellee responds:	No

INTRODUCTION

This Court has in its prior decisions precisely summarized the problem presented in this appeal. *Hoffner v Lanctoe*, 492 Mich 450, 821 NW2d 88 (2012). In *Hoffner*, this Court summarized the question with which it was presented as follows:

Michigan, being above the 42nd parallel of north latitude, is prone to winter. And with winter comes snow and ice accumulations on sidewalks, parking lots, roads, and other outdoor surfaces. Unfortunately, the accumulation of snow, ice, and other slippery hazards on surfaces regularly traversed by the citizens of this state results in innumerable mishaps and injuries each year. This case tests the extent of a premises owner's liability for one of those winter-related accidents. In this case, plaintiff recognized the danger posed by ice on a sidewalk, yet chose to confront the hazard in an ultimately unsuccessful effort to enter the premises. Plaintiff claims that the premises' owners should be liable for her injuries, while the premises' owners argue that they are not liable because plaintiff's accident occurred as the result of an ordinary, open and obvious condition.

Id., at 454-455. This Court in *Hoffner* “rejected plaintiff’s argument that the hazard in this case was effectively unavoidable because plaintiff had a business interest in entering the premises.” This appeal presents the identical problem, as the Plaintiff has complained she had a business interest in entering Grand Dimitres’ restaurant on February 26, 2014, a day upon which she slipped and fell in an allegedly icy parking lot while going to work.

Yet, the Court of Appeals’ majority opinion turned a blind eye to Michigan Supreme Court precedent when it expanded the scope of the limited exceptions to the open and obvious doctrine. In truth, “this case is unremarkable both in its simplicity and its frequent occurrence in Michigan.” *Id.*, at 455. The facts themselves are not compelling or different than any of the many other snow and ice cases that this Court and the Court of Appeals has dismissed with frequency over the past 20 or more years.

What sets this case apart is the visceral attempts by the trial court, Court of Appeals and the Plaintiff to rip open the very limited and narrow exceptions to the open and obvious doctrine. That doctrine, which is rooted in common law and was explained in detail by this Court in *Lugo v Ameritech*, 464 Mich 512; 629 NW2d 384 (2001), permits a finding of a duty where there are “special aspects.” Both in *Lugo* and as discussed by this Court in more recent decisions, the special aspects exceptions to the open and obvious doctrine are limited. See, e.g., *Hoffner*, 492 Mich at 468. (“Unavoidability is characterized by an *inability to be avoided*, an *inescapable* result, or the *inevitability* of a given outcome. Our discussion of unavoidability in *Lugo* was tempered by the use of the word “effectively,” thus providing that a hazard must be unavoidable or inescapable *in effect or for all practical purposes.*”) (emphasis in original)

Here, as with a number of other precedentially binding cases that were not followed by the majority, the Plaintiff had options that made the known icy condition of the subject parking lot avoidable. Those options were never discussed or mentioned in the majority opinion, which is sufficient basis to reverse since those options are pivotal in determining whether special aspects existed *a priori*.

The Defendant has argued a number of options the Plaintiff could have chosen, including, for example:

1. Remain in her vehicle until the condition was remedied;
2. Return to the property when the condition was resolved;
3. Use her cell phone to call others for assistance;
4. Park closer to one of two front doors; or
5. Park parallel to one of the covered, cleared and salted sidewalks.

Any one of those options is sufficient to defeat a special aspects claim because any one of them render the condition avoidable. However, the Court of Appeals majority declined to follow *Lugo*, *Hoffner*, *Perkovic v Delcor Homes-Lake shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2002),

and the plethora of other cases that warrant dismissal, and instead opted to find that those cases “simply cannot be the law.” The majority, however, does not have the luxury of ignoring binding precedent, as the dissent points out. Consequently, summary disposition should be granted to the Defendant and this case should be remanded for entry of a final dismissal order.

STATEMENT OF FACTS

Introduction

This is a standard, run-of-the-mill slip and fall on snow and ice case that has been needlessly complicated by diversions that have no business being discussed under the objective open and obvious doctrine. Plaintiff-Appellee (hereinafter “Plaintiff”) slipped and fell on snow and ice as she walked from her vehicle into the restaurant at which she was employed as a waitress. The Plaintiff admitted she saw ice, snow and water allegedly covering the entire parking lot when she arrived and even before she got out of her vehicle. Instead of parking closer to one of the three entrances to the restaurant, the Plaintiff chose to park 70 feet from the rear entrance. In fact, there were many parking spots available that were closer to one of the entrances, including the two doors located at the front entrance where two co-workers had successfully entered prior to her arrival. The Plaintiff had other options at her disposal as well, as is discussed in more detail below. The Plaintiff’s failure to exercise one of the many other options available to her does not create a duty to warn under the open and obvious doctrine.

Factual Background

The Plaintiff was a waitress working at Grand Dimitres restaurant for ten years prior to the subject incident. (Exhibit B, deposition of Plaintiff, p. 19) The Plaintiff routinely parked in the back parking lot, and did so on the morning of February 21, 2014. She and her counsel insist that the weather that winter was very snowy, and that as a result, snow and ice accumulated in Grand

Dimitres' parking lot. Given that knowledge, the Plaintiff testified she was aware of the condition of the parking lot for at least two months prior the incident. (Exhibit B. p. 42)

Specifically, Plaintiff testified she was aware that snow and ice "had been accumulating every day for two months." (Exhibit B. p. 42) Indeed, she testified that although the snow would be plowed, she did not see the cement of the parking lot during the wintery months. (Exhibit B, p. 42) That said, the Plaintiff admitted she was personally aware that an icy parking lot could be slippery as she had slipped in the same lot in the winter prior to this incident. (Exhibit B, p. 87) Even more telling, the Plaintiff was aware that another individual had fallen in the parking lot the day prior to her fall. (Exhibit B, p. 117)

On February 21, 2014, the Appellee arrived for work at approximately 5:50 a.m. (Exhibit B, p. 30) She saw another waitress' (Deborah Buck's) vehicle in the parking lot. (Exhibit B, pp. 31-32) The Plaintiff testified:

Q. Did you see the snow coming into the parking lot –

A. Yes.

Q. –on the – let me just finish the question. Did you see the snow coming into the parking lot?

A. Yes.

Q. Did you know it might be slippery in the parking lot?

A. Yes.

(Exhibit B, p. 32)

At that moment, the Plaintiff was confronted with a number of different options. While she claims that employees had to use the rear entrance, the record reveals that at least two Grand Dimitres' employees used one of the two *front* entrances on February 21, 2014. (Exhibit C, deposition of Deborah Buck, p. 22) Thus, one option was to use the front entrance like her co-workers did. Another, related option was to park nearer the front door, which is covered and salted by the manager of Grand Dimitres, so as to avoid ice and snow altogether. A third option that the

Plaintiff could have chosen, was to use the cell phone she had in her possession (Exhibit B, p. 46) and call either the restaurant to find out how Ms. Buck and Mr. Spear were able to successfully enter the restaurant, or, in the alternative, to call either the property manager, the restaurant manager or the snow removal company to request assistance. Another option would have been for her to simply wait, given the above-freezing temperatures, for the ice to melt. (Exhibit D, weather records) Finally, the Plaintiff could have also simply gone home, informed her employer it was not safe for her to leave her car to get into the restaurant, and then return when it was “safe.”

Although she knew the parking lot might be slippery, the Plaintiff did not choose any of those options. Instead, she got out of her vehicle (where she was safe) to traverse the parking lot. (Exhibit B, p. 32) Furthermore, although she knew the parking lot might be slippery, knew she had a cell phone, **knew there was a front parking lot available for use**, knew there were two front doors available to use, and knew that her employer used salt to keep a portion of the sidewalk and front doors clear, she instead decided to exit her vehicle and walk across the lot she could see and admittedly knew was “dangerous.” (Exhibit B, p. 34) Even more telling, Plaintiff ultimately called a co-worker after her fall and requested that the co-worker open the front door of the restaurant for her, something she could have easily done before her fall. (Exhibit B, pp. 46, 101)

Following the Plaintiff’s fall, her clothes were so wet because of her fall that she returned home to change them. (Exhibit B, p. 46) She then returned to work, **parked in another spot, safely walked into the restaurant without incident**, and completed her shift that day. (Exhibit B, pp. 49-50) She also worked the following day. Given the multiple successful attempts to go inside the restaurant by Plaintiff and Grand Dimitres’ employees and customers, it is clear that the “slippery” parking lot was absolutely avoidable by the Plaintiff even after she refused to exercise the alternative options she had.

Procedural History

The Defendant filed a motion for summary disposition in the trial court. (Exhibit E, motion for summary disposition; Exhibit F, reply brief on motion for summary disposition) The bases of the motion for summary disposition, which was brought at the end of discovery pursuant to MCR 2.116(C)(10), was the open and obvious doctrine and possession and control. The trial court found that the snow, ice and water upon which the Plaintiff allegedly fell was open and obvious but contained special aspects. The trial court also denied the other basis of the Defendant's motion, that it was not in possession and control. (Exhibit G, trial court order; Exhibit H, transcript from hearing on motion for summary disposition)

The Defendant filed an application for leave to appeal to the Court of Appeals after the trial court denied its motion. (Exhibit I, application for leave to appeal) The application for leave was unanimously granted by the Court, and the Defendant's brief on appeal and reply brief on appeal followed in short order. (Exhibit J, brief on appeal; Exhibit K, reply brief on appeal) Oral argument in the Court of Appeals was held on September 6, 2018. (Exhibit L, Court of Appeals docket, entry 50)

The Court of Appeals' opinion and order (hereinafter "majority opinion"), concurring opinion and opinion concurring in part and dissenting in part (hereinafter "dissenting opinion") were issued on February 26, 2019. (Exhibit A; Exhibit M, concurring opinion; Exhibit N, opinion concurring in part and dissenting in part) As is noted *supra*, the majority opinion cites binding precedent from this Court and the Court of Appeals, but improperly applies and outright refuses to acknowledge that this area of law is well settled: "It simply cannot be the law that a premises owner can render an all-encompassing hazard on the property 'effectively unavoidable' by claiming that no one should come near the property." Notably, the Defendant did not make the

argument that no one should visit the premises; instead, the Defendant focused on the other options the Plaintiff had to enter the premises safely based upon the record evidence.¹

The concurring opinion that was issued in this matter attempts to distinguish the case law of this Court and the Court of Appeals. The concurrence, particularly when discussing *Bullard v Oakwood Annapolis Hosp.*, 308 Mich App 403, 864 NW2d 591 (2014), states the plaintiff there “had several means to avoid the icy condition.”² As is discussed above, and analyzed in greater detail *infra*, the Plaintiff here also had several means to avoid the icy condition.

Of the three opinions, the dissent was the only one that focused on what the binding law is and not what it should be. It analyzed precedent, worked through analogous factual situations and arrived at a conclusion that was consistent with both. The dissent lacked a clear desire to justify a conclusion, as both the majority opinion and the concurring opinion objectively seem to do.³

The Defendant filed a motion for reconsideration and highlighted three bases:

1. The Court of Appeals incorrectly described the location of the fall in an attached picture within its opinion, an error which limited the areas the Plaintiff could have parked and options she had to avoid the icy condition.
2. The majority erred in failing to adhere to binding precedent from both this Court and Michigan Supreme Court precedent related to “effectively unavoidable.” Indeed, by

¹ This is not to say that the issue of Plaintiff leaving the premises altogether without exiting her vehicle was not discussed at oral argument. To be fair, the issue *was* raised at oral argument after counsel received a question from the panel related to that very issue. And while that certainly *is* an option that was available to the Plaintiff as binding precedent from this Court has held, *Hoffner*, 492 Mich 450, the Defendant chose not to rely only upon that one option during oral argument. Thus, it is unfair and incongruent for the Defendant’s argument to be thematically phrased as “no one should come near the property.”

² The Defendant actually disputes outright the concurrence’s suggestion that the plaintiff in *Bullard* had “several means to avoid the icy condition.” As the Court in *Bullard* stated, “Part of [plaintiff’s] property maintenance duties included testing the hospital’s five generators, which Bullard did on a monthly basis. One of the generators is located on the hospital roof and is not easy to access – servicing it **required** Bullard to climb an indoor ladder to reach the roof, open a hatch, cross a stone walkway, scale another ladder, cross a metal catwalk to the generator, and finally walk across three 2 x 8 planks to reach the generator’s control panel. The planks, **which are the only way to reach the control panel, are not secured and are approximately 5 to 6 feet above the roof.**” What the plaintiff actually had in *Bullard* were options that he could have chosen to avoid going where he subjectively felt compelled to go, which is discussed in more detail, *infra*.

³ In addition to commenting on the fact that the state of the law in Michigan “simply cannot be,” the concurring opinion demonstrates obvious frustration with the law in this area: “And no one – at least not yet – has suggested that plaintiff should have worn a jet pack or come to work hours early and salted the parking lot herself so that when she returned for her shift the dangerous conditions would have abated.”

suggesting that “[i]t simply cannot be the law that a premises owner can render an all-encompassing hazard on the property ‘effectively unavoidable’ by claiming no one should come near the property” the majority drastically expanded the limited exceptions to the open and obvious doctrine.

3. The majority was distracted by Court of Appeals and Michigan Supreme Court precedent that employees are not obligated to encounter open and obvious conditions and instead failed to focus on the many alternatives the Plaintiff had to avoid the icy condition.

(Exhibit O, motion for reconsideration) The Defendant’s motion was denied, again on the basis of a two-to-one decision. (Exhibit P, order denying reconsideration) This appeal has followed.

LAW AND ARGUMENT

The Plaintiff clearly had alternative options on February 21, 2014 that made the icy parking lot avoidable. Those options, which are based upon binding precedent from this Court and the Court of Appeals included:

1. Remain in her vehicle until the condition was remedied;
2. Return to the property when the condition was resolved;
3. Use her cell phone to call others for assistance;
4. Park closer to one of two front doors; or
5. Park parallel to one of the covered, cleared and salted sidewalks.

The focus implemented by the trial court and the Court of Appeals was not to review what the Plaintiff *could have done* but focused, improperly, on what she did.

The proper analysis under the open and obvious doctrine absolutely requires the Court to view the evidence objectively to determine whether there were alternatives to encountering an allegedly dangerous condition. Here, there were alternatives, but neither the trial court nor the Court of Appeals discussed why or how they were inadequate despite the record evidence. As the Defendant has consistently argued throughout this matter, the icy parking lot was avoidable given the numerous options the Plaintiff had available to her and, therefore, this Court should accept the present application to address those and reverse the trial court and Court of Appeals’ orders.

I. Standard of Review

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 120, 597 NW2d 817, 823 (1999). Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); MCR 2.116(G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358, 547 NW2d 314 (1996).

The application for leave to appeal to the Michigan Supreme Court must show that, "...in an appeal of a decision of the Court of Appeals, (a) the decision is clearly erroneous and will cause material injustice, or (b) the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals." MCR 7.305(B)(5). The Michigan Supreme Court reviews *de novo* the trial court's decision to grant or deny summary disposition. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 196-97, 747 NW2d 811, 815 (2008) (citation omitted). In making this determination, the Court reviews the entire record to determine whether defendant was entitled to summary disposition. *Maiden*, 461 Mich at 118. When reviewing a grant of equitable relief, an appellate court will set aside a trial court's factual findings only if they are clearly erroneous, but whether equitable relief is proper under those facts is a question of law that an appellate court reviews *de novo*. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40, 700 NW2d 364 (2005).

II. Recitation and Analysis of Michigan Premises Liability Law

Michigan premises liability law is well-known given that it arises out of the common law and, to the extent it was necessary, has been well-defined by this Court in recent years. Pertinent to the discussion here, the open and obvious doctrine was clarified by this Court in *Lugo v Ameritech*, 464 Mich 512; 629 NW2d 384 (2001). While *Lugo* is seminal premises liability law, and therefore a recitation of its facts and analysis is likely rote, its correct application is of critical importance to the present matter.

In *Lugo*, the plaintiff “was walking through a parking lot... when she apparently stepped in a pothole and fell.” *Id.*, at 514. The plaintiff testified that she was not paying attention to where she was walking because she was focused on a truck that was in the parking lot. The defendant moved for summary disposition which was granted by the trial court but reversed by the Court of Appeals. This Court reversed the holding of the Court of Appeals and reinstated the trial court’s order.

Typically, *Lugo* is cited more for the standard to ascertain whether a condition is open and obvious. Whether the condition at issue was open and obvious is not in dispute in this appeal. Indeed, Plaintiff has not cross-appealed the trial court’s ruling that the icy parking lot she knew was icy was open and obvious. Thus, there is no need to delve into what constitutes an open and obvious condition.

However, *Lugo* also provides the standard for the *exceptions* to the open and obvious doctrine, that is, what “special aspects” of an open and obvious condition create a duty to warn when one would otherwise not exist. The Court eloquently explained this in its opinion as follows: “[T]he general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk

unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.” *Id.*, at 517.

To determine what special aspects of a condition there are that render an open and obvious condition unreasonably dangerous, the Court provided the following examples:

An illustration of such a situation might involve, for example, a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable. Similarly, an open and obvious condition might be unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm. To use another example, consider an unguarded thirty foot deep pit in the middle of a parking lot. The condition might well be open and obvious, and one would likely be capable of avoiding the danger. Nevertheless, this situation would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous to maintain the condition, at least absent reasonable warnings or other remedial measures being taken. In sum, only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine.

Id., at 518-19. Applying the doctrine to a common, everyday pothole at issue in that case, the *Lugo* Court dismissed the plaintiff’s complaint because there was no finding of special aspects.

The next case to take particular focus on the issue of special aspects was this Court’s opinion in *Hoffner v Lanctoe*, 492 Mich 450, 821 NW2d 88 (2012). This Court in *Hoffner* was presented with an incredibly similar situation as it has once again been faced with here:

Michigan, being above the 42nd parallel of north latitude, is prone to winter. And with winter comes snow and ice accumulations on sidewalks, parking lots, roads, and other outdoor surfaces. Unfortunately, the accumulation of snow, ice, and other slippery hazards on surfaces regularly traversed by the citizens of this state results in innumerable mishaps and injuries each year. This case

tests the extent of a premises owner's liability for one of those winter-related accidents. In this case, plaintiff recognized the danger posed by ice on a sidewalk, yet chose to confront the hazard in an ultimately unsuccessful effort to enter the premises. Plaintiff claims that the premises' owners should be liable for her injuries, while the premises' owners argue that they are not liable because plaintiff's accident occurred as the result of an ordinary, open and obvious condition.

Id. at 454-455. The Court recognized the rather banal nature of the facts and circumstances that led the litigants to the Hall of Justice. “In many regards, this case is unremarkable both in its simplicity and its frequent occurrence in Michigan. **Yet there has been some confusion surrounding the application of the open and obvious doctrine to wintry conditions.**” *Id.*, at 455. (Emphasis added).

Thus, this Court accepted the defendant's application for leave to appeal to take the opportunity to clarify the interplay between the open and obvious doctrine and snow and ice conditions, and in so doing, analyzed specifically what “special aspects” make an open and obvious condition otherwise unreasonably dangerous. The Court began its analysis by recognizing that “[p]erfection is neither practicable nor required by the law....” *Id.*, at 460. Thus, people remain responsible for taking reasonable precautions for their safety, which is the impetus behind the open and obvious doctrine. *Id.* The open and obvious doctrine “is an *objective standard*, calling for an examination of the objective nature of the condition of the premises at issue.” *Id.* (Internal quotations and citations omitted). Quoting *Lugo*, this Court reiterated that when determining whether a condition contains special aspects, “it is important to maintain the proper perspective which is to consider the risk posed by the condition *a priori*, that is, before the incident involved in a particular case.” *Id.*, quoting *Lugo*, 464 Mich at 518 n. 2.

When, as here, wintry conditions are found to be open and obvious, “premises owner's duties are considerably narrowed.” *Id.*, at 464. This Court utilized the Court of Appeals' decisions

in *Joyce v Rubin*, 249 Mich App 231; 642 NW2d 360 (2002); *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1; 649 NW2d 392 (2002); and *Robertson v Blue Water Oil Co*, 268 Mich App 588; 708 NW2d 749 (2005)⁴ to elucidate when “effectively unavoidable” special aspects arise. *Id.*, at 465-468. Then, in its discussion and application of the relevant law, the Court found that “[u]navoidability is characterized by an *inability to be avoided*, an *inescapable* result, or the *inevitability* of a given outcome.” *Id.*, at 468. In choosing to use “effectively” to further define unavailability, this Court further recognized that an open and obvious hazard “must be unavoidable or inescapable *in effect* or *for all practical purposes*.” *Id.* (Emphasis in original)

On that basis, the Court found that the icy condition, located directly in front of the defendant’s only entrance was open and obvious and did not contain special aspects so as to impose a duty on the defendant. In response to the very arguments that have been set forth in this case by the plaintiff, trial court and Court of Appeals (i.e., the Plaintiff had a particular pecuniary interest in using the premises), this Court stated the following:

We reject these conclusions permitting recovery for a typical hazard confronted under ordinary circumstances as inconsistent with the law of this state regarding the duty owed to invitees and premises owners' resultant liability for injuries sustained by invitees. The law of premises liability in Michigan provides that the duty owed to an invitee applies to any business invitee, regardless of whether a preexisting contractual *or other relationship exists*, and thus the open and obvious rules similarly apply with equal force to those invitees.

Id., at 469. (Emphasis added) However, the Court did not stop there. “Perhaps what is most troubling regarding the theory of liability advanced by plaintiff is that it would result, if upheld, in

⁴ In discussing *Robertson*, the Court specifically addressed another issue of incredible importance to the present matter. The plaintiff in *Robertson* was attempting to enter a gas station by the only available means when he slipped and fell on the icy and snowy parking lot. The Court of Appeals reversed a finding of summary disposition in that matter. In discussing the Court of Appeals’ rationale in *Robertson*, this Court made specific note that “**to the extent that Michigan courts in *Robertson* or otherwise alluded to a new breed of business invitee protection, we disavow that reasoning as inconsistent with traditional principles of premises liability law.**” *Id.*, at 472. (Emphasis added)

an expansion of liability by imposing a new, *greater* duty than that already owed to invitees.” *Id.*, at 470.

By providing that a simple business interest is sufficient to constitute an unquestionable necessity to enter a business, thereby making any intermediate hazard “unavoidable,” plaintiff’s proposed rule represents an unwarranted expansion of liability. It would, in effect, create a new subclass of invitees consisting of those who have a business or contractual relationship. Such a rule would transform the very limited exception for dangerous, effectively unavoidable conditions into a broad exception covering nearly all conditions existing on premises where business is conducted. Such a rule would completely redefine the duty owed to invitees, allowing the exception to swallow the rule. This proposed rule appears to be an erroneous extrapolation of the basic principle that invitees are owed a greater duty of care than licensees or trespassers. Simply put, Michigan caselaw does not support providing special protection to those invitees who have paid memberships or another existing relationship to the businesses or institutions that they frequent above and beyond that owed to any other type of invitee. Neither possessing a right to use services, nor an invitee’s subjective need or desire to use services, heightens a landowner’s duties to remove or warn of hazards or affects an invitee’s choice whether to confront an obvious hazard. **To conclude otherwise would impermissibly shift the focus from an objective examination of the premises to an examination of the subjective beliefs of the invitee.**

Id., at 470-471. (Emphasis added). That is, without a doubt, precisely what the Plaintiff, trial court and Court of Appeals have thus far accomplished in this case.

Indeed, in this case the Plaintiff has argued that her status as an employee of Grand Dimitres created the unavoidable condition she was “required” to confront. **The *Hoffner* Court has a direct response to the Plaintiff’s argument.** In examining this Court’s ruling in *Perkoviq v Delcor Homes-Lake Shore Pointe Ltd.*, which involved a slippery condition on a roof that the plaintiff argued he had to encounter because of his job, this Court stated the following:

The unreasonableness of a hazard remains the touchstone for permitting recovery under the “special aspects” exception to the open and obvious doctrine. For example, in *Perkoviq v. Delcor Homes–Lake Shore Pointe Ltd.*, the plaintiff’s employment in the

construction business necessitated that he work around a slippery condition while preparing to paint a partially constructed home. Unfortunately, the plaintiff slipped on ice or frost; he pursued a premises liability claim against the general contractor. This Court unanimously concluded that the open and obvious doctrine barred recovery and that no special aspects existed with regard to a typical slippery condition occasioned by the presence of snow and ice. Relevant here, it cannot be said that compulsion to confront a hazard by the requirement of employment is any less “avoidable” than the need to confront a hazard in order to enjoy the privileges provided by a contractual relationship, such as membership in a fitness club. *Perkoviq* illustrates that an overbroad understanding of effective unavoidability cannot undermine the historical parameters of the limited duty owed when the condition is open and obvious.

Id., at 471-472. Given the analysis and legal authority it weighed and as is described above, this Court in *Hoffner* determined that even though the plaintiff was forced to confront ice when she wanted to enter the defendant’s premises, and even though there were no alternative means to enter the defendant’s premises, the ice was not only open and obvious, but it contained no special aspects that made the condition unreasonably dangerous. Judgment was thus entered for the defendant.

III. Application of this Court’s Legal Authority

In this case, we must review the condition of the premises before the Plaintiff’s fall occurred to determine whether it contained special aspects. According to the Plaintiff, the entire parking lot was covered in ice. (Exhibit B, page 42) However, her employer used salt at the front entrances to clear snow and ice from the area. (Exhibit B, page 34) The Plaintiff was asked by her employer to park in the rear of the lot and enter the back door; however, two employees utilized reasonable care for their own safety and entered the front door on the morning the Plaintiff fell. (Exhibit B, p. 40) When the Plaintiff arrived at work that morning, she was in her car, parked in the lot, and knew there was ice on the parking *before she got out*. (Exhibit B, p. 32) While she was in her car, she knew she had her cell phone with her, but did not use it to call for help or to

find out how the people she *knew* were inside the restaurant were able to gain access. (Exhibit B, p. 46)

Under the above factual circumstance, it is evident that the icy parking lot did not contain special aspects as the condition was absolutely avoidable. First, as was discussed in *Hoffner* and held in *Perkovic*, the Plaintiff's employment alone did not require her to enter the restaurant. This is true because she was not effectively trapped inside of her vehicle. She could have used her vehicle to move it to a different location, including, as the dissenting opinion suggested, anywhere in Michigan. But, most importantly, she could have used it to move closer to the salted front doors. She chose not to do that. She instead chose to exit her vehicle. That fact alone does not under any circumstances require that the defendant be held liable for her eventual fall.

In reality, the Plaintiff, understanding that there was ice in the parking lot, could and should have investigated each of the three entrances to the restaurant. She should have done so, in an exercise of reasonable care for her well-being, as required under Michigan law. If she had done so, consistent with Michigan common law, she could have avoided the condition altogether by either parking in the front parking lot nearer the two front doors where her employer had placed salt or, she could have parked parallel to one of the two front doors, exited her vehicle onto the salted and covered sidewalk near the two front doors, and entered the restaurant.

Plaintiff surely will argue that she did not have a key to either front door. Again, this is of no theoretical or practical consequence to this matter. Michigan law in its purest form requires only another avenue of entrance for the open and obvious doctrine to apply. However, in this case, the Plaintiff had her cell phone and could have used it to call to gain entrance to the restaurant, as she did *after* her fall.

In fact, while sitting in her car the Plaintiff, consistent with applicable case law, could have used her cell phone to call her co-workers to find out how they successfully got into the restaurant. *Barch v Ryder Transp Services*, unpublished Michigan Court of Appeals decision, decided October 20, 2016 (docket no. 327914).⁵ (Exhibit Q)

These are the options the Plaintiff had *before* she got out of her vehicle. They are the options that individually are sufficient to find that there were no special aspects to the icy condition on February 21, 2014. Collectively, they are a formidable grouping of alternatives that bankrupt the Plaintiff's argument that she was forced to encounter the icy parking lot upon which she was eventually injured. However, they were not mentioned by either the majority or concurring opinions, which is an unusual and unfortunate unforced error that the Defendant respectfully requests this Court remedy.

IV. Responding to the Majority Opinion

It is anticipated that the Plaintiff will respond to the present application with full-throated support for the majority and concurring opinions. The majority opinion, as discussed above, fails to address the options the Plaintiff had to avoid the icy parking lot. That is certainly the primary failure of the Court of Appeals' majority opinion.

However, the majority opinion engages in some judicial activism when it states "[i]t simply cannot be the law that a premises owner can render an all-encompassing hazard on the property 'effectively unavoidable' by claiming no one should come near the property." (Exhibit A). In that one sentence, the Court disregarded the above alternatives argued by the Defendant, but also disregarded Michigan Supreme Court precedent. While the undersigned has never had the honor

⁵ This Michigan Court of Appeals unpublished opinion is being cited as there is no other published opinion of which the Defendant is aware that has found that the availability of a cell phone provides yet another option a plaintiff can utilize to avoid an open and obvious condition.

of being an appellate judge, it is presumed that there is necessarily some weighing of record evidence that goes into rendering an opinion and order. Thus, disregarding options such as those proffered by the Defendant can be forgiven and rectified by this Court. However, rendering an opinion that flies in the face of not one, but at a minimum two Michigan Supreme Court opinions that address this very issue is troubling.

At its basic level, this case presents a Plaintiff that was not trapped in her car. She had gas, keys, a cell phone and everything else necessary to leave the parking spot she chose and could go literally anywhere else she wanted. To put it in much more simpler terms, the Plaintiff's *entrance* was allegedly blocked in this matter. Juxtaposing that situation with the example in *Lugo*, where the only *exit* was blocked, that difference alone should have been enough to enter judgment in favor of the Defendant.

However, *Lugo* is not the only Michigan Supreme Court decision that was discounted by the majority opinion. The majority also failed to distinguish in any way this Court's *Hoffner* decision. And, not to put too fine a point on it, *Hoffner* answers all of the questions and concerns that are presented by this case, and requires entry of judgment in favor of the Defendant. *Hoffner* addresses the employment situation here, addresses the duty owed to invitees and specifically refuses to create a heightened duty for those that have contractual or other relationships on the premises. To rule as the Court of Appeals has, the *Hoffner* Court notes, "**would impermissibly shift the focus from an objective examination of the premises to an examination of the subjective beliefs of the invitee.**" *Hoffner*, 492 Mich at 471. In short, the Michigan Court of Appeals has attempted previously to render an opinion just like the one attached as Exhibit A, and this Court has not once, but twice refused it to pass muster. See, e.g., *Hoffner* and *Perkoviq*. This

application should be accepted and the Court of Appeals opinion and order should be reversed in hopes that the third time is the charm.

V. Responding to the Concurring Opinion

The concurring opinion, which by its own admission is a response to the dissenting opinion, takes an interesting view of the case law cited herein. For example, the dissenting opinion raises the matter of *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403; 864 NW2d 591 (2014). In the concurring opinion, it states, “In [*Bullard*], the injured party, who was not employed at the subject premises, had several means to avoid the icy condition.” (Exhibit M) However, a dissection of *Bullard* reveals that not to be the case.

In *Bullard*, the plaintiff was a contractor working at Annapolis Hospital and on a monthly basis was required to inspect its five generators as a part of his job duties. As this Court explained, “One of the generators is located on the hospital roof and is not easy to access — servicing it required Bullard to climb an indoor ladder to reach the roof, open a hatch, cross a stone walkway, scale another ladder, cross a metal catwalk to the generator, and finally walk across three 2 x 8 planks to reach the generator’s control panel. The planks, which are the only way to reach the control panel, are not secured and are approximately 5 to 6 feet above the roof.” *Id.*, at 406. Thus, Bullard did not have “several means to avoid the icy condition” and instead he was “required” to go through a maze of ladders and walkways until he eventually came to three planks that were “the only way to reach the control panel.” *Id.* Accordingly, the concurring opinion mistakenly conflated the path that Bullard was “required” to take with the options that Bullard had available to him *a priori* to avoid the condition altogether.

Accordingly, when discussing whether the ice on the three planks contained special aspects, the Court explained as follows:

Here, the ice on which Bullard slipped was not effectively unavoidable. In fact, the opposite is true: Bullard had ample opportunity to avoid the ice. He confronted the ice after making multiple decisions, any one of which he could have decided differently and thus avoided the hazard. Bullard was clearly aware of the potential risks of inspecting the generator on February 23, because he asked the hospital staff to clear the stone pathway and wood planks on February 22. He arrived at Oakwood between 4:00 a.m. and 4:30 a.m. on February 23 — a time when it was still dark. Rather than wait until daylight, Bullard chose to inspect the generator at this early hour, when it was dark and cold. When he opened the hatch to the roof, he saw that the pathways to the generator had been cleared of snow, as he had asked. As noted, the path to the generator involved a walk across multiple surfaces: a stone walkway, another ladder, a metal catwalk, and the 2 x 8 planks. Bullard chose to traverse each of these, before eventually slipping on the ice, falling, and suffering injury.

Accordingly, Bullard's fall was the end result of choices he made that could have been made differently. In no way was he "effectively trapped" by the ice — he consciously decided to put himself in a position where he would face the ice. After informing the hospital staff of the roof's snowy condition, Bullard could have refused to inspect the generator the next day, and instead waited until the weather improved — the inspection was a monthly occurrence and not necessitated by an emergency. On February 23, he could have waited to inspect the generator until later in the morning, when daylight might have alerted him to the possible hazards of doing so. When he reached the roof, he could have turned back — but he did not. He could have returned inside at any point on his journey to the generator — at the stone walkway, at the second ladder, at the catwalk — and sought assistance. And, again, because his job duties entailed monthly inspections, he had the option of speaking with his employer or to the hospital staff — as he did on February 22 — regarding the conditions on the roof.

In sum, there is nothing inescapable or inevitable about Bullard's accident. His argument to the contrary, which is that he was required to face the ice by virtue of his employment is unavailable, and similar arguments have been rejected by the Michigan Supreme Court. His job duties did not mandate that he encounter an obvious hazard.

Bullard could have made different choices that would have prevented him from encountering the ice, and the ice was accordingly not effectively unavoidable. The trial court's ruling that the ice could be shown to be effectively unavoidable was wrong.

In the concurring opinion, this analysis is missing. True, the Plaintiff alleges she had to encounter the icy parking lot in this case because of her employment. However, that is not the beginning and end of the discussion according to this Court's precedent. This Court has consistently stated that a discussion of the options that confront a Plaintiff prior to the incident must be ascertained when making a decision on the issue of special aspects. The concurring opinion (and indeed even the majority opinion) did not do that. However, what makes the concurring opinion even more concerning is the fact that it merely states "in this case plaintiff was an employee and had to report to work on the morning she was injured" as the basis for distinguishing *Bullard*.

In fact, the concurring opinion is comparing apples and oranges. The concurring opinion mistakenly used the *Bullard* Court's analysis of the options available to the plaintiff there and compared it only to the Plaintiff's subjective statement that she was "required" to encounter the open and obvious condition. Instead, to properly follow *Bullard's* analysis, the concurring opinion should have compared the *a priori* options the Plaintiff had here to the *a priori* options that Bullard had. Had the concurring opinion done so, it would have come to the correct conclusion that the icy condition did not contain special aspects.

The concurring opinion also addresses this Court's decision in *Perkoviq v Delcor Homes-Lake Shore Point, Ltd*, 466 Mich 11; 643 NW2d 212 (2002), in an attempt to distinguish it from this case. In *Perkoviq*, the plaintiff was a painting subcontractor. His job required him to paint the second floor of a home that was under construction. A portion of the roof was icy, the plaintiff knew it, and encountered the situation regardless of that knowledge. The plaintiff fell, injured himself, and subsequently filed suit against the premises owner. The trial court granted summary disposition to the defendant on open and obvious grounds. The plaintiff appealed and the Court

of Appeals reversed. The defendant then filed an application for leave to this Court, which reversed in part and reinstated the order granting summary disposition.

In so doing, this Court noted that the case “presents a classic example of an open and obvious danger in the premises liability setting.” *Id.*, at 16. The Court engaged in an analysis of the condition, and found that it was not only open and obvious, but that it did not contain special aspects.⁶ *Id.*, at 19-20.

The concurring opinion utilizes the simple yet effective analysis in *Perkoviq* to suggest that it is distinguishable on the basis of possession and control: “Here, the defendant-landowner, not the restaurant’s owner or his employees, was responsible for maintenance of the parking lot. Accordingly, defendant had no basis to conclude that the restaurant would take the ‘appropriate precautions.’” (Exhibit M) However, this is a distinction without a difference as it is irrelevant who is responsible for maintaining the premises when determining if a condition has special aspects.

In fact, the dissenting opinion did not raise *Perkoviq* to suggest the condition did not contain special aspects because of the entity that was in possession and control; on the contrary, the dissenting opinion presumably raised *Perkoviq* to demonstrate that an employee that faces an open and obvious condition cannot prevail simply because her employment subjectively “requires” her to encounter it. Thus, the concurring opinion’s attempts at distinguishing *Perkoviq* fail because it is distinguished on grounds that have no impact on the case at hand. It is further worth mentioning that the concurring opinion, when discussing this Court’s decision in *Perkoviq*, did not discuss the implication that employment alone does not create a special aspect.

⁶ Note, the Court found as such despite the fact that the plaintiff’s employment was the impetus for him encountering the icy rooftop.

VI. The Impact of *Lymon v Freedland* on the Present Case

In 2016, the Court of Appeals issued the opinion in the matter of *Lymon v Freedland*, 314 Mich App 746; 887 NW2d 456 (2016). In that matter, the plaintiff worked as a home health care aide for the defendant's mother. On January 4, 2013, the plaintiff arrived at the defendant's home for her scheduled shift. She had on at least one prior occasion attempted to drive into the defendant's inclined driveway and "bottomed out." As such, she parked on the street and attempted to walk up the driveway. The driveway was described by plaintiff to be covered in snow with ice built-up underneath. The plaintiff testified that she could distinguish the driveway and the yard, but that she could not walk on the yard because of the incline. Halfway up the driveway, the plaintiff slipped, fell and injured herself. After initiation of the claim by plaintiff and discovery, the defendant moved for summary disposition, same was denied by the trial court and it entered judgment in favor of the plaintiff pending resolution of the defendant's appeal of the trial court's open and obvious decision.

The Court of Appeals found that the condition of the driveway was open and obvious. However, when determining whether there were special aspects, the Court of Appeals found they existed. Without detailed analysis of *Perkoviq*, and while distinguishing *Hoffner*, the Court of Appeals ruled that "there was a question of fact as to whether plaintiff was compelled to confront the hazardous risk posed by the snowy and icy conditions at the Freedland home. A reasonable juror could conclude that, unlike the plaintiff in *Hoffner*, plaintiff in this case did not have a choice about whether to confront the icy conditions. As a home healthcare aide, plaintiff did not have the option of abandoning her patient, an elderly woman who suffered from dementia and Parkinson's disease." *Id.*, at 763-764.

Here, as the dissenting opinion observed, the implication of *Lymon* is as follows:

Thus, implicit in the *Lymon* Court holding is that employees generally do have the option to decline to report for work when the circumstances are deemed too hazardous. But for public policy reasons, some jobs, due to their importance dealing with the safety and well-being of others, will effectively remove from the employee the “option” of not reporting for work, despite the attendant compulsion of confronting hazardous risks.

(Exhibit N)⁷ However, the dissenting opinion found that this case is “easily distinguishable from *Lymon* because the ramifications of plaintiff not reporting to work at the restaurant are not comparable to those of the home healthcare worker in *Lymon* not reporting to work.” (Exhibit N, p. 4).

And, in fact, this analysis, even assuming *arguendo* that *Lymon* was decided correctly, is accurate. The plaintiff in *Lymon* was faced with the impossible, and potentially life-altering option of encountering a dangerous condition herself or, in the alternative, jeopardize the life of her patient. Respectfully, the Plaintiff here did not face that type of life choice. The Plaintiff here was aware that another server was already in the restaurant. (Exhibit B, pp. 31-32) Presumably, she also knew that serving Grand Dimitres’ customers was not a matter of life or death as compared to the difficult decision presented in *Lymon*. For these reasons, the *Lymon* decision has no impact on the open and obvious analysis required. Accordingly, this Court should accept the Defendant’s application, reverse the Court of Appeals’ opinion and order and remand with instructions to enter judgment in the Defendant’s favor.

⁷ Note, as does the Defendant, the dissenting opinion questioned whether the *Lymon* decision was correctly decided given the case law that has been discussed herein. (Exhibit N, n. 3)

CONCLUSION AND RELIEF REQUESTED

This Court has previously recognized that “the accumulation of snow, ice, and other slippery hazards on surfaces regularly traversed by the citizens of this state results in innumerable mishaps and injuries each year.” The Court of Appeals’ opinion in this case poses a genuine risk of degrading the common law of this State and the binding principles of this Court’s precedent, thereby forcing open the floodgates to needless litigation that is contrary to the rule of law.

The more reasoned approach is to follow this Court’s precedent. There, the answers to the very questions presented by this case have already been decided; yet, those answers were ignored by the trial court and Court of Appeals. They were discarded, in fact, because a majority of the Court of Appeals panel felt that this Court’s precedent, “simply cannot be the law.” If only it were that simple.

This Court stands to ensure that the law of this State, through legislative action, established precedent and common law, has meaning. That meaning, this Court’s authority, binding precedent and justice cannot be shooed away because of the Court of Appeals’ feelings on what is and is not the law. There must be something more required, and where there is a lack of substantive and articulated reasoning, established rules of justice must prevail and impart a predictable resolution. The Court of Appeals disagreed with this legal stronghold. That simply cannot be the law.

Respectfully Submitted by:

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Dated: June 3, 2019

INDEX OF EXHIBITS

Exhibit	Description
A	Majority Opinion from the Court of Appeals
B	Deposition of Plaintiff
C	Deposition of Deborah Buck
D	Weather Records from February 2014
E	Defendant's Motion for Summary Disposition
F	Defendant's Reply Brief
G	Trial Court Order
H	Transcript from MSD hearing
I	Defendant's Application for Leave to Appeal
J	Defendant's Brief on Appeal
K	Defendant's Reply Brief on Appeal
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M	Concurring Opinion
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P	Order Denying Reconsideration
Q	Barch v. Ryder, 327914

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

DONNA LIVINGS,

Appellee,

Supreme Court No. _____
Court of Appeals No. 339152
Trial Court No. 2016-1819-NI
Trial Court Judge:
Hon. Edward A. Servitto

v

SAGE’S INVESTMENT GROUP, LLC,
a Michigan limited liability company,
T&J LANDSCAPING & SNOW REMOVAL,
INC., a Michigan Corporation and GRAND
DIMITRE’S OF EASTPOINTE FAMILY
DINING, a Michigan Corporation

Appellants.

**ORAL ARGUMENT
REQUESTED**

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PROOF OF SERVICE

The undersigned certifies that she served a copy of Defendants-Appellants Sage’s Investment Group, LLC’s Application for Leave to Appeal, upon the attorneys of record of all parties to the above cause via True-Filing, the Court’s e-filing system, on June 3, 2019.

/s/ Kelly Solak
Kelly Solak